

**A SUGGESTED APPROACH TO SOLVING THE COUNTERMAJORITARIAN
DILEMMA IN A CONSTITUTIONAL DEMOCRACY**

by

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SUMMARY

The author explores the traditional approaches to interpretation in a constitutional democracy, with specific emphasis on Bill of Rights interpretation. The approaches adopted by the court in India and Canada, are briefly outlined with a view to gleaning from the experience of these countries, a theory which will inform a proper approach to interpretation in a South African context. He concludes that the value-based approach is most appropriate to concretise the rights entrenched in the Bill of Rights, and specifically the so-called second and third generation rights. Addressing the fear that this may lead to an undisciplined judiciary, he concludes that there are sufficient disciplining mechanisms to ensure that the courts do not encroach upon the other branches of government.

KEY TERMS

countermajoritarian - constitutional - interpretation - values - value-based - originalism - political process - purposive - libertarian - communitarian



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INTRODUCTION

The enactment of the interim Constitution¹ in 1994 resulted in a "copernican revolution"² in South African constitutional law. It replaced the British system of parliamentary sovereignty, founded upon the Diceyan concept of the rule of law - and which had applied for more than a century - with that of Constitutional democracy.

Under the former system, parliament is supreme and the role of the judiciary is limited to giving effect to the will of the legislature, whilst under the latter the Constitution is supreme, subjecting all spheres of government to its operation. The role of the judiciary is expanded to act as the guardian of the rights of the individual and the institutions of government, all subject to the provisions of the Constitution, of course.

To illustrate this point, the role of courts under the previous system was limited to questioning the procedural validity of acts of parliament or the executive.³ Section 2 of the Constitution firmly entrenches the position that South Africa is a constitutional democracy with a supreme constitution,⁴ in terms of which any law or conduct inconsistent therewith is invalid. This means that the Constitution is the criterion or standard by which any act, be it the legislature, executive, judiciary, an organ of state, or any individual in certain instances,⁵ must be

¹Act No 200 of 1993, which was subsequently replaced with the Constitution of the Republic of South Africa, Act No. 108 of 1996, hereafter referred to as the "Constitution". Where reference is made in this paper to the Constitution, it is to the final Constitution unless stated otherwise. It is interesting to note the argument that the Constitution is supreme and therefore it is not necessary to number it as is done with any other act of parliament.

²Du Plessis and Corder *South Africa's Transitional Bill of Rights* 60. The authors use the term to aptly illustrate the revolution in South African Constitutional law.

³Section 34(2) read with section 34(3) of Act 110 of 1983.

⁴See also in this regard the preamble which is read as part of the Constitution, which refers to the Constitution as: "... the supreme law of the Republic". Section 1(c) says that South Africa is founded on "supremacy of the Constitution and the rule of law".

⁵Section 8(1) of the Bill of Rights binds all three spheres of government. Section 239 defines "organ of state" in such general terms to include, for example, para-statal. Section

measured.

The task of reviewing these acts or conduct for compliance with the Constitution is vested primarily in the judiciary.⁶

While the courts have always had the power of judicial review, its scope and functions have now increased to such an extent that it may declare invalid a legislative or executive act for want of compliance with the Constitution.

Herein lies the thrust of the countermajoritarian dilemma. Acts of parliament or the executive are the products of a popularly elected legislature, who are mandated by, and represent, the people. They are an expression of the will of the majority. The judiciary, as an unelected branch of government,⁷ is authorised to declare invalid these legislative products. The judiciary, seen in this light, is thus a distinctly countermajoritarian institution.⁸

In order to check the unbridled role of the courts, it is thus necessary to adopt a theory of interpretation which will ensure that the courts do not usurp the function of the legislature. While this is a debate which has engaged South African legal scholars only since the advent of the interim Constitution, it is one which has vexed the minds of many scholars who are governed by constitutional democracies, and certainly for much longer.

8(3) binds natural or juristic persons in certain circumstances. These, of course, all apply to the Bill of Rights.

⁶Section 167(4) and (5). Section 169 vests limited powers of constitutional review in the High Court. See also section 39 in regard to the Bill of Rights.

⁷In South Africa, judges are appointed by the Executive in terms of sections 174(3) and (4) of the Constitution.

⁸Chaskalson *et al Constitutional Law of South Africa* (1995) 11 - 16 A. The authors argue that it is ironic that, after decades of minority rule, we now have a popularly elected legislature, whose acts can be invalidated by the judiciary.

In this paper, I will explore the various theories of interpretation - none of which are completely satisfactory - which have been postulated to solve the countermajoritarian problem, and also look briefly at the jurisdictions of other countries whose constitutions have helped shape our own, to see how they have dealt with the problem.

I will then suggest an approach to interpretation which I believe confronts the countermajoritarian dilemma, with an emphasis on its strength and weaknesses.

2 An Exercise For Legal Theorists

Before proceeding with a discussion of the theories of interpretation, however, a more fundamental question requires clarification, that is, whether the countermajoritarian dilemma merely provide legal scholars with an opportunity to engage in academic debate over something which is really not an issue at all. In other words, does the problem actually exist?⁹

- i) One view holds that while judicial review is undemocratic, it is nevertheless necessary to protect those who are not adequately protected by the political process.¹⁰ The Court is part of the democratic system and judicial review is exercised to check the majority. This approach does not, however, solve the basic problem, that is, that the court is not a majoritarian institution.
- ii) Schauer,¹¹ in turn, argues that the distrust of judges is unfounded and that an unconstrained decision-maker does not necessarily mean that more bad than good judgements will be handed down. This view, however, reduces decision-making to a lottery where there would be no certainty, or direction given by courts.

⁹This question is briefly explored in *Rights and Constitutionalism* by Van Wyk *et al* (1994) and particularly the chapter by Davis *et al* titled "Democracy and Constitutionalism: the role of Constitutional interpretation" at 8.

¹⁰Choper *J Judicial Review and the National Political Process* (1980)

¹¹"The calculus of distrust" (1991) 77 *Va LR* 653

- iii) A third view¹² holds that the pressure of criticism will ultimately force the court to reverse a bad decision. The objections to this argument are pragmatic and substantive. Firstly, this could be a time-consuming exercise in which the court can delay or even sterilise the legislative process. Secondly, it disregards the role of the court in informing and shaping public opinion.

Given the fallibility of the views above, it is clear that the problem does exist, and that a workable theory which justifies the role of judicial review is the only way in which to address the problem.

3 Theories of Interpretation

It has been stated that an adequate theory of interpretation must do more than provide a set of protocols and principles of textual interpretation. It must confront the countermajoritarian dilemma and justify the exercise of judicial power. Furthermore, it must establish a set of principles which will enable the courts to determine when and under what circumstances they would be required to adopt an aggressive approach to judicial intervention, and conversely, when a more deferential attitude is called for.¹³

Various theories have been advanced to confront this difficulty. These range from strict originalism to interpretivism or contextualism. However, for various reasons none of them satisfactorily answers the problem, as will be seen below.

¹²Dahl "Decision making in a democracy: The Supreme Court as national policymaker" (1957) 6 *J Pub L* 279 in Davis *et al op cit* 10

¹³Chaskalson *et al op cit* at 11 - 17. While such an approach recognises that the law is not objective, neutral and capable of exact interpretation, Klarman argues for exactly such a theory, stating that it must be capable of objective implementation with criteria which are sufficiently certain to produce consistent results. See Klarman "The puzzling resistance to the political process theory" (1991) 77 *Va LR* 747.

i) Originalism

This theory holds that excavating the meaning of what the drafters of the constitution intended, ensures fidelity to the constitution, and serves as a brake on the power of the court to impose its own value-judgements. In this way consistency and coherence of constitutional jurisprudence are achieved.

The adherents¹⁴ of the theory of strict intentionalism argue that judges should do no more than ascertain the will of the legislature. They justify this view on the supremacy of the constitution, as an expression of the will of people, which gives judges no more discretion than to ascertain the intent of the framers.

Robert Bork,¹⁵ in turn, argues for a softer approach by proposing a theory of original intent based on the objective will of the people at the time of enactment of the constitution; in other words, what the ordinary person understood the document to mean at the time of its enactment.

The problem with strict intentionalism is that it is impossible to ascertain that which the framers of a particular right sought to protect; for example, was the equal protection clause in the United States Constitution aimed at protecting only blacks, or did it include other marginalised minority groups? The fact that this question cannot be answered with certainty already suggests that this theory does not exhibit uniformity and coherence.

Furthermore, in a South African context our interim Constitution was a product of compromise drafted at Kempton Park, accepted by the Constituent Assembly and

¹⁴Meese (1986) 45 *Public Admin LR* 701; Berger "Constitutional Interpretation and Activist Fantasies" (1993) 82 *Kentucky L J* 1.

¹⁵"Neutral Principles and Some First Amendment Problems" (1971) 47 *Indiana L J* 1.

merely ratified by parliament. Whose intent do we resort to?¹⁶

The more fundamental objection to this approach, however, is the wisdom or indeed legitimacy of binding subsequent generations to values and beliefs, traditions and customs which have become inimical to the values of a present-day society. In other words, its failure to acknowledge the mutable nature of society. Therefore it fails to take into account the fact that the drafters may not have envisaged - and thus provided for - present circumstances, and yet the courts are now required to resolve the issue in dispute.

The fact that the Constitution needs to be responsive to contemporary problems was recognised by Friedman J in *Nyamakazi v President of Bophuthatswana*, when he states that a constitution must be interpreted in the "context, scene and setting that exists at the time, and not when it was passed ...".¹⁷

In the same vein, Canadian legal commentators have equated the Constitution with a living tree, that is, a method of interpretation which keeps constitutional interpretation relevant to the changes in society.¹⁸ Like a tree, the Constitution is capable of organic growth. For it to grow as a living tree, a constitution must be susceptible to a method of interpretation which fulfils the basic principles of constitutionalism in a diverse and liberal society. Originalism contradicts any such approach, as is illustrated in the United States Supreme Court decision of *McGautha v California*.¹⁹

¹⁶This problem is succinctly stated by Ronald Dworkin when he asks whose intentions judges should consult - the congressmen who debated the amendments, the state legislatures who ratified them or the public whose wishes they were enforcing? - cited in Chaskalson *et al op cit*, at 11 - 19 fn 3.

¹⁷1992 (4) SA 540 at 567 D - E.

¹⁸See in this regard Lorraine Weinrib "Sustaining Constitutional values - The Schreiner legacy" 1998 (3) *SAJHR* 351 at 369.

¹⁹402 US 183.

Using the theory of original intent, Black J found that the prohibition of "cruel and unusual punishment" did not render the death penalty unconstitutional. He found it "inconceivable that the framers intended to end capital punishment by the Amendment".²⁰

In the South African context, Chaskalson JP has made it clear that background material may only be used as an aid to interpretation, and then only when it is clear, beyond dispute and casts light on why a particular provision was either included in or excluded from the Constitution.²¹

In the face of both the pragmatic and principled objections outlined above, and the failure of originalism to answer satisfactorily these objections, it does not provide a satisfactory response to the countermajoritarian problem.

ii) Political Process Theory

This theory seeks to limit judicial review to those cases where the courts would remedy defects in the political process in order to protect minorities and other marginalised groups who themselves cannot seek redress through the ordinary political processes.²² Courts may strike down legislative acts when the legislature has acted undemocratically. The court may, therefore, employ a stricter standard of scrutiny when determining the constitutionality of statutes which are directed at religious, national or racial minorities, because prejudice against them may seriously impede the operation of those processes ordinarily relied on for the protection of minorities.

²⁰At 226.

²¹*S v Makwanyane* 1995 (3) SA 391 (CC) at para 17 - 19.

²²This theory was introduced by JH Ely *Democracy and Distrust: A Theory of Judicial review* (1980) and is based on the footnote by Judge Harlan Stone in *United States v Carolene Products Company* 304 US 144 at 152.

In his footnote, Judge Stone articulates three bases on which the court may legitimately intervene to remedy the political process. Firstly, a court may resort to originalism when it invalidates legislation which contravenes a specific constitutional provision. Secondly, it may review legislation which impedes the repeal of legislation which is undesirable, and, finally, it may review legislation which facilitates prejudice against minorities and prevents them from seeking protection through the ordinary political process.

While this theory is aligned to countermajoritarianism, because it views the court as a mechanism for reinforcing the democratic process, it suffers two fundamental flaws. Firstly, constitutional instruments do not merely specify a set of procedures for democratic representation. They articulate a commitment by the people to the collective development through individual self-fulfilment, and as such the principles contained therein are essentially value-laden. Thus Cass Sunstein²³ argues that even rights which have a primarily procedural function are aimed at promoting substantive values, such as dignity, equality and privacy, which go beyond merely securing the integrity of the political process.

Compliance with the three levels of scrutiny outlined in *Caroline Products* is fraught with interpretive difficulties and does not admit of easy application. This is illustrated by the decisions of the Supreme Court of the United States relating to racial discrimination.

In *Washington v Davis*²⁴ the applicants attacked the legality - under the civil rights legislation - of the hiring practices of the police in the district of Columbia. To be accepted, applicants were required to pass an examination. Plaintiffs contended that the test by its very nature excluded a large proportion of African-Americans because of

²³*The Partial Constitution* (1993) 103 at 104 - 105. Also Tribe "The Puzzling Persistence of Process-Based Constitutional Theories" (1980) 89 *Yale LJ* 1063.

²⁴426 US 229 (1976).

their inherently disadvantaged background, and, furthermore, it bore no relation to job performance. The court refused to declare the hiring practices unconstitutional "solely because it had a racially disproportionate impact".

In *Regents of the University of California v Bakke*,²⁵ these difficulties are even more pronounced. The university had argued that discrimination against members of the white majority was Constitutional if the purpose thereof was benign.

Justices Brennan and Powell reached different conclusion's on interpreting the equal protection clause. Powell²⁶ stated that when a racially based statute distributes benefits or imposes burdens based solely on skin colour, it had to be proved that such legislation is necessary to promote a substantial state interest [my emphasis], and, therefore found the offending legislation unconstitutional for want of compliance with the equal protection clause. Brennan²⁷ reached the opposite conclusion, finding that no fundamental right was breached in the subject case.

The second objection to the process-based theory is its claim to neutrality of the political process. It seeks to uphold a rigid distinction between the courts as the mechanism for reinforcing the democratic process, and the legislature as the source of substantive value judgements. Any encroachment by the courts would amount to the illegitimate usurpation of the legislature's functions. Given that the courts - as illustrated by the experience of the United States above - do make substantive decisions, it is clear that this distinction cannot be sustained.

²⁵438 US 265 (1978).

²⁶At 320.

²⁷At 356 - 7.

iii) Other Theories

A number of scholars have proposed constitutional theories based on tradition or consensus. In *Moore v City of East Cleveland, Ohio*,²⁸ Powell J found a housing ordinance unconstitutional because it nullified a long-standing tradition. In this case, the ordinance limited the occupancy of houses to a narrowly defined family. Finding the statute unconstitutional, he stated that the concept of an extended family is deeply rooted in the history and tradition of the nation.

The problem inherent in this approach is similar to the fundamental criticism of originalism, that is, it seeks to bind successive generations without proper justification. Furthermore, the level of generality, time frame and community from which one infers tradition is open to infinite manipulation.

Wellington²⁹ on the other hand propagates a *consensus* theory, arguing that the Supreme Court is well positioned to translate conventional morality into legal principle. The critique of this theory is the unlikelihood of finding meaningful *consensus*, and even if one could, the question then is why the court is better suited at discerning it than the legislature.

A third approach invites judges to interpret the constitution as an open text and to fill the gaps which arise in the text.³⁰ This is also referred to as the fundamental rights theory, and it is justified on the basis that the framers intended that the constitution be interpreted in this open-ended manner. The Ninth Amendment, which provides that certain rights shall not be construed in such a manner as to deny other rights retained by the people, is often used to support this theory.

²⁸431 US 494, 503 (1977).

²⁹Wellington H "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication" (1973) 83 *Yale LJ* 221.

³⁰West "Progressive and Conservative Constitutionalism" (1990) 88 *Michigan LR* 641.

The problem, however, is that of finding the source of fundamental rights. Scholars have suggested various sources ranging from neutral principles to natural law. The common criticism of this theory is that it licenses judges to interpret vague constitutional provisions as they see fit.

None of the above theories, therefore, provide us with the answer to the question of why the judiciary should be allowed to declare unconstitutional legislative or executive acts. How then has the judiciary in other constitutional democracies³¹ - and specifically those with a tradition of Westminster style constitutionalism³² - met this criticism? Analysis of the approach adopted by the court in the United States, Canada and India reveals an ideological and jurisprudential struggle by the court to develop a coherent set of constitutional values which can be used as criteria for decision-making. It also reveals an attempt to develop an approach to constitutional interpretation which recognises the value-based nature of a constitution and seeks to give meaning to the underlying purpose thereof. In other words, an approach which goes beyond the mere literal interpretation of the text.

These jurisdictions are also relevant and provide meaningful insight into a proper approach to interpreting our own Constitution. In the United States, judicial review is not expressly provided for in the constitution and was only developed by the court in *Marbury v Madison*,³³ accordingly, the countermajoritarian problem has been the subject of vigorous and continual debate there.

³¹Chapter 2 of the Constitution draws heavily upon the influences of the US (the so-called 1st generation rights), Canada (the limitation clause, section 36(1), which is based on section 1 of the Canadian Charter), India and Germany (the 2nd and 3rd generation rights which are similar to the directive principles of state policy included in part IV of the Indian Constitution).

³²Here I refer specifically to Canada and India.

³³5 US 137 (1803).

India has similar socio-economic problems as that pertaining in South Africa, and an examination of the Supreme Court's approach is, therefore, extremely apposite, while the Canadian Charter of Rights is similar to ours although it contains an override provision in terms of which the legislature may override the courts in certain circumstances if it strikes down legislation.³⁴

4 Comparative Jurisprudence

(i) Canada

Section 1³⁵ of the Canadian Charter holds the key to the theory of interpretation adopted by the court, and the scope and ambit of judicial review.

In *Andrews v Law Society, British Columbia*³⁶ the supreme court adopted a purposive approach to Constitutional interpretation. Here the court was asked to interpret section 15(1) of the Charter (the equality clause).³⁷ The court proceeded to examine and identify the purpose of the right. It stated that section 15 was to be read as a whole, and within the context of the Constitution, and from this its purpose was to be ascertained.

It concluded that the purpose of section 15(1) was to prevent discrimination and prejudice against historically disadvantaged groups. McIntyre J went on to say that "the

³⁴Section 33 of the Canadian Charter, which is also known as the "notwithstanding clause".

³⁵Section 1 guarantees the rights and freedoms set out in the charter, subject to those reasonable limits such as may be demonstrably justifiable in a free and democratic society.

³⁶(1989) 56 DLR (4th) 1.

³⁷It provides that every individual is equal before and under the law and has the right to equal benefit of the law and, in particular, without discrimination based on race, national ethnic origin, colour, religion, sex, age or mental or physical disability. Section 15(2) provides for the implementation of affirmative action.

promotion of equality under section 15 has a much more specific goal than the mere elimination of discrimination.³⁸"

However, the initial conflict which the supreme court experienced in adopting a proper interpretive approach is illustrated by the decisions of *R v Oakes*³⁹ and *R v Big M Drug Mart*.⁴⁰ These cases show not only the value-laden nature of section 1 (and indeed all constitutional instruments which seek to articulate a principled set of guidelines for governance), but also the court's attempt to grasp the dynamism of a theory of interpretation which reconciles democratic principles with the protection of individual rights.⁴¹

In *Oakes* the court demanded a stringent standard of justification before it was prepared to limit a constitutionally guaranteed right or freedom. Dickson DJ stated that "to establish where the limit is reasonable and demonstrably justifiable in a free and democratic society, two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter Right or Freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right of freedom. The standard must be high to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain section 1 protection. Secondly ... the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test."⁴²

³⁸At 171.

³⁹(1986) 26 DLR (4th) 200.

⁴⁰(1985) 18 DLR (4th) 321.

⁴¹Morton, Russel and Withey "The Supreme Court's First Hundred Charter of Rights Decisions: Statistical Analysis" (1992) 30 *Osgoode Hall LJ* 1 examine the decisions of the court between 1984 - 1987 and conclude that it is value divided on interpreting section 1 issues.

⁴²At 227.

Conversely, in *Big M Drug Mart* the court adopted the view that the guaranteed rights should be given a generous interpretation, and warned against overshooting the purpose of the right.⁴³

It has been suggested⁴⁴ that the purposive approach reconciles the tension embodied in restricting Charter-guaranteed rights or freedoms without undermining the civil liberty values underpinning it. Hogg suggests that the purposive approach can adequately explain the approach of the court in both *Oakes* and *Big M Drug Mart*. In other words, it can accommodate the stringent justification required for limitation in the former and the generous interpretation of rights or freedoms stated in the latter.⁴⁵

(ii) India

The judgement of Khanna J in *Kesavananda v State of Kerala*⁴⁶ laid the foundation for social justice interpretation in India.⁴⁷ Appended to the Bill of Rights, the constitution contains a schedule of directive principles of state policy. The primary goal of the constitution, according to the court, is the promotion of a democratic welfare state. Consequently, constitutional interpretation must concretise this objective.⁴⁸

⁴³*Op cit* at 359 - 360. In seeking to ascertain the purpose of the right the court may be guided by, for example, the language in which it is expressed, the implications drawn from the context of the right, its relationship to other rights and *travaux preparatoire*.

⁴⁴Hogg "Interpreting the Charter of Rights" (1990) 28 *Osgoode Hall LJ* 817

⁴⁵Joel Bakan, however, criticises the court's failure to act as an instrument for progressive social change notwithstanding the charter rights commitment thereto - Bakan "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" *Canadian Bar Review* Vol. 70 (1991) 107.

⁴⁶AIR 1973 SC 1461 at 1880.

⁴⁷The countermajoritarian debate has not enjoyed the focus accorded to it in US jurisprudence. This probably explains the aggressive interventionism of the court - see in this regard *Davis et al* in *Van Wyk et al op cit* 47.

⁴⁸In *ABSK Sangh (Railway) v Union of India* AIR 1981 SC 298 at 355 the court stated that "... the expositors are to concern themselves not with words and mere words only, but,

The view of the supreme court is that although the directive principles are unenforceable, they advance social and economic democracy. The court is bound to these principles when interpreting the constitution because all organs of state are obliged to treat them as fundamental to governance of the country.⁴⁹

Social justice interpretation has enabled the court to collapse the classic libertarian / communitarian dichotomy which has pervaded US constitutional jurisprudence, and embark on a process of public interest litigation in terms of which it has expanded fundamental rights so that they serve a social rather than individual function.⁵⁰ In this way, the court has given the masses of disadvantaged access to court, and, more importantly, realisation of their social and economic entitlements under the constitution.

The court, however, accepted its limitations in this regard in that the rules of procedure and standing, based as it was on Anglo-Saxon tradition, effectively denied the majority of people access to justice.

Departing from the traditional rule of standing, the court granted any member of the public or social action group acting bona fide, the right to bring an application for redress on behalf of a person or class of persons, who by their social disability were unable to do so, and where their rights had been infringed.

as much with the philosophy or what we may call the "spirit and sense of the Constitution".

⁴⁹Bhagwati J in *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789.

⁵⁰In *Hussainara Khatoon v State of Bihar* - AIR 1979 SC 1361 the court expanded the meaning of the right to life and liberty to include the rights to a speedy trial. Subsequent decisions have included under this right, the right to representation (*Sheela Barse v Union of India* AIR 1983 SC 378) the right to human dignity (*Francis Coralie Mullen v Union of Territory of Delhi* AIR 1981 SC 746). See also for the extension of the ambit of the right to life; *Tellis v Bombay Municipal Corporation* (1987) LRC (Const) 351 (SC) cited in *Davis et al op cit*.

In this instance, the court also adopted the doctrine of so called "epistolary jurisdiction", in terms of which such an application may be brought merely by writing a letter to court who would then order an investigation⁵¹ and issue a directive to remedy the situation.⁵²

Due to the problem the court faced with enforcement of its decisions, it appointed monitoring agencies who were required to report back to court periodically. This, however, has also been the single major factor in the court's present re-appraisal of public interest litigation.⁵³

The Indian Supreme Court thus developed a purposive approach to constitutional interpretation in terms of which it excavated the values central to the constitution, these being social justice, human dignity and substantive equality.

(iii) USA

The theories of interpretation developed in the United States have already been alluded to in the beginning of this paper.

Two observations warrant mention, however.⁵⁴ Firstly, whether or not the judiciary is inspired by libertarian or communitarian values will inform the process of interpretation, and allied to this is the premise that judges' decisions reflect the particular value system to which they subscribe.

⁵¹Bhagwati PN "Judicial Activism and Public Interest Litigation"(1985) *Columbia Journal of Transitional Law* 561 - 577 at 574 - the court appoints commissions of inquiry to investigate alleged infringements.

⁵²In *Sheela Barse* the court handed down guidelines for the treatment of all pre-trial prisoners - *op cit*.

⁵³*Op cit*.

⁵⁴Which I hope to argue later is foundational to the exercise of constitutional interpretation.

Calibresi⁵⁵ argues persuasively that the difference between the Rehnquist and Warren courts may be ascribed more to their particular ideological approaches than their judicial activism or restraint. The fact is that both subscribe to the Madisonian notion of judicial review, and both courts could be described as activist. However, their different political philosophies would guide them to opposing interpretations of the same right.

Thus the Rehnquist court would curtail rights because of the fear of the abuse of judicial power, while the Warren court, interpreting the same right, would reach an opposite result.

In part I, I suggested that any satisfactory theory of constitutional interpretation must confront the countermajoritarian dilemma and justify the exercise of judicial power. Parts II and III have briefly analysed the various theories and comparative jurisdictions to determine whether something may be gleaned from the experiences of other countries facing this problem. I submit that, while these theories and experiences are instructive and will certainly inform an appropriate response to the problem, they do not finally resolve the question of the theory which best answers the countermajoritarian dilemma while at the same time keeping a check on our unbridled judiciary. It is to this issue I now wish to turn.

5 **Towards an appropriate theory**

I suggest that a theory of interpretation must meet three challenges. It must accept that constitutional instruments are value-laden, that judges are influenced by their system of values and beliefs and that the judges' subscription to either a libertarian or communitarian view of the constitution will inevitably impact on the decision of the court.

A theory which recognises these premises would recognise the countermajoritarian dilemma as a reality, and attempt to meet the dilemma head-on. "Lawyers can best address problems

⁵⁵"The Supreme Court - Forward" (1991) 105 *Harvard L R* 80 at 109.

concerning the democratic legitimacy of judicial power by honesty about and critical understanding of the plasticity of legal interpretation and of how interpretive practices are a medium for articulating social visions".⁵⁶

i) The inevitability of values

A constitution, and specifically one which includes a justiciable bill of rights is an embodiment of the principles, norms and standards which the people have articulated in a written document. As such, it is a statement of values and the people are the source of these values.

The South African Constitution with its bill of rights is no different. It is a statement of the people's commitment to a society based on freedom and equality, non-racialism and non-sexism.⁵⁷ Consequently a court could reach different conclusions when interpreting a right or freedom, both conclusions being rationally defensible. But this flies in the face of those who argue that law is universal and formal. It is a set of principles which are generally valid and which may be applied objectively and neutrally.

It also means that judges make law, which is anathema to those who argue that this is nothing more than the usurpation of the power of the legislature and the judicialisation of politics. But judges do make law, even in systems where parliament is supreme.⁵⁸

⁵⁶Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 at 187.

⁵⁷Chapter 2 of the Constitution. It is uncontroversial that the bill of rights is value-laden. See Botha "The Values and principles underlying the 1993 Constitution" 1994 *SAPL* 233 and Kruger "Is interpretation a question of common sense? Some reflections on value judgements and section 35" 1995 *CILSA* 1.

⁵⁸Lester "English Judges as Law Makers" (1993) *SAPL* 269, where he argues that the court in England has been engaged in law-making either wittingly or unwittingly (at 278). Bagwhati *op cit* at 562, Shamman "The Constitution, the Supreme Court and Creativity" 1982 *Hastings Constitutional Law Quarterly* 257, Feliciano "The Application of Law; some

ii) The influence of values

Allied to this is the question of whether or not a judge infuses into - or is at least influenced by - her own values during the process of interpretation. I submit that she does. Joel Bakan⁵⁹ argues persuasively that this is one of the reasons why the Canadian Constitution has not been used as an instrument for progressive social change. He argues that judges are mostly drawn from an elite social strata, with an affinity for dominant ideologies representing wealth and economic power. This is due to institutional discrimination whereby law schools are only affordable to the wealthy who, once graduated, are taken up in wealthy firms, servicing huge corporations, with little emphasis on socially orientated legal issues. Consequently, the judiciary is dominated by wealthy white males, while other groups such as females and members of visible minorities are grossly under-represented (this is true also in South Africa). He concludes that the Canadian judiciary is thus not representative of the people on any of the established bases.⁶⁰

The way in which the judiciary has been influenced by its own values is illustrated by the experience in India, where conservative and privileged judges who were hostile to the redistribution of wealth, exhibited executive benevolence during the Ghandi era.⁶¹ The views of the judge are grounded and formed within the context of his or her culture and tradition.

recurring aspects of the process of judicial review and decision-making" 1992 *American Journal of Jurisprudence* 17.

⁵⁹Bakan *op cit* at 18

⁶⁰This, ironically, gives more credence to the countermajoritarian movement.

⁶¹Ghouse and Dhavan: attributes the court's protection of property rights against social reform legislation, to its need for protecting its own interests, *The Supreme Court: A Socio-legal critique of its Juristic Techniques* (1977). See also in this regard Calibresi *op cit* who states that in the US, judicial review often involves the enforcement by judges of their own views rather than the citizenry's notion of the ambit of good government.

iii) The philosophical basis

This brings us to the final premise: if a constitution is a statement of values, and judges do inevitably allow their own values to influence their decisions, then the fact that judges support either a libertarian or communitarian philosophy will determine the way in which they interpret a particular right or freedom.



Foundational to our Constitution is the commitment to - and at the same time tension between - freedom and equality.⁶² Classical liberal theory sees the individual as an autonomous source of power with protected zones of liberty into which the state cannot intrude. The individual presupposes, and is the precondition, for society. Communitarianism, by contrast, argues that the individual is shaped by the society in which she exists. Our identities are, therefore, largely defined by and dependant upon the various communities we inhabit and the practices in which we participate.⁶³

Human beings are social beings

This tension and the extent to which it influenced the interpretive exercise of the judges, have been lucidly illustrated in two recent judgements of the constitutional court.

In *Du Plessis v De Klerk*,⁶⁴ the court was asked to determine whether the bill of rights operated horizontally between private individuals or vertically, that is only between the state and individuals. The court found that it did not. In the traditional liberalist argument, Kentridge AJ adopts the libertarian approach which leads him to conclude that bills of rights are ordinarily intended to protect the subject against legislative and

⁶²Section 1(a) states that the Constitution is founded on the values of freedom and equality. Section 39(1) invites the court explicitly to promote the values of equality and freedom when interpreting a provision of the bill of rights.

⁶³S Woolman and D Davis "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights Under the Interim and Final Constitutions" (1996) *SAJHR* 361 at 386 - 387.

⁶⁴1996 (3) SA 850 (CC).

executive action.⁶⁵

In contradistinction to this, the dissenting judgement of Kriegler J shows a clear commitment to a communitarian philosophy. He criticises the philosophical approach which underpin the majority judgement. For him, their judgement reflects the "prevailing misconception held by some and egregious caricatures propagated by others".⁶⁶ He rejects the arguments on which the fear of horizontal application is based and argues an approach which recognises the imbalance in private relationships and the need for horizontal application so as not to perpetuate these injustices. He concludes that "no one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring the benefits of an open and democratic society based on freedom and equity".⁶⁷

*Ferreira v Levin NO*⁶⁸ was concerned with the question of whether section 417 of the Companies Act 1973 (Act No 61 of 1973) was constitutional, for its breach of the rule against compulsory self-incrimination. Ackerman J based his interpretation of the right to freedom in section 11(1) of the interim Constitution on the negative liberty of the individual, that is, "The right of individuals not to have obstacles to possible choices and activities placed in their way ... by the state".⁶⁹ He therefore concludes that the section should be accorded a generous and extensive interpretation.

⁶⁵*Op cit* at para 45. In fn 74 he similarly observes that traditionally bills of rights have been inserted in Constitutions to strike a balance between governmental power and individual liberty.

⁶⁶At 120. See also the view of Madala J who recognises simply that our jurisprudence needs to come to terms with the abuse of power from any source - at para 154.

⁶⁷Para 145.

⁶⁸1996 (1) BCLR (CC).

⁶⁹At para 54 - in his views on protecting freedom in the negative sense he draws heavily on the work of Isaiah Berlin's concepts of liberty for support (*Four Essays on Liberty* (1969)).

However, Ackerman himself recognises the difficulty of this approach, in that it could provide the basis for setting aside a range of welfare legislation because their provisions would encroach upon individual autonomy. For this reason, he concludes that "it is [to me] inconceivable that the broad sweep of labour legislation in this country could be struck down because of an argument that it infringed rights of contractual freedom protected by the Constitution".⁷⁰

In their criticism of the majority's decision in *Du Plessis*, Davis and Woolman⁷¹ present a persuasive argument against the pillars of classic liberalism and its claim to individual autonomy. They posit a philosophy of "creole liberalism" which they contend recognises all relationships as socially and politically constructed and inform continued public discourse and debate about the value and form of social relationships. "Creole liberalism" comes closer to harmonising the basic values⁷² enumerated in the Constitution than does classical liberalism, and should, therefore be the philosophical foundation for any interpretive exercise, since it allows the courts to concretise these values.

There is a tension between individual autonomy and collective power. The solution is succinctly stated by Davis⁷³ who concludes that "our Constitution enjoins us to conceive of our society as one in which the collective becomes a source of autonomy rather than

⁷⁰At para 65.

⁷¹*Op cit* at 386 - For them creole liberalism lies in the theses that in a free and democratic society an array of cultures and moral doctrines may spontaneously and organically produce new cultures and moral doctrines that reflect a convergence of basic beliefs and practices - at 163 fn 3. For an opposing view however, see Sprigman and Osborne "Du Plessis Is NOT Dead: South Africa's 1996 Constitution AND THE APPLICATION OF THE BILL OF RIGHTS TO PRIVATE DISPUTES" 1999 (15) *SAJHR* 25 - they argue that the court should only step into a private dispute when the legislature has failed to do so, and then only via an indirect application of the Bill of Rights (at 50).

⁷²The values and equality, freedom, dignity and openness.

⁷³Davis "The Underlying Theory That Informs the Wording of our Bill of Rights" *SALJ* (1996) 385 at 393.

a threat to its functions".
~~_____~~

iv) Value-based interpretation

Section 39(1) of the Constitution is an explicit textual injunction to the courts to interpret the bill of rights in the light of the values which underlie an open and democratic society based on human dignity, equality and freedom. A value based interpretation recognises the value-laden nature of constitutional review and interprets the Constitution in a manner which gives expression to those values. The appropriate institutional role of the judiciary is the protection of fundamental rights. The judiciary may consider questions of principle and political morality where this is required to protect the rights of individuals.

In *West Virginia State Board of Education v Barnette & Others*⁷⁴ Jackson stated it thus "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities ... and to establish them as legal principles to be applied by the courts. One's right to life ... and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections".

In the early existence of the South African Constitution the courts have recognised and given approval to this approach. In *Qozeleni v Minister of Law and Order*,⁷⁵ Froneman J states that "... because the Constitution is the supreme law ... all law or conduct ... must be examined with a view to extracting from it those principles or values against which such law or conduct can be measured".

⁷⁴319 US 624.

⁷⁵1994 (3) SA 625 at 633 H and at 634 B - C he states that if the Constitution is to fulfill its stated purpose, it must not only be interpreted in such a manner as to give expression to the clear values it seeks to nurture ... " [my emphasis].

In *S v Makwanyane*⁷⁶ the court reflecting upon the role of the judiciary and legislature and the influence of public opinion - specifically regarding the continued use of the death penalty - stated that there were certain issues which cannot be left to the legislature. In this regard, it found that public opinion is particularly relevant to the legislature and plays no role with the court.⁷⁷

A value-based approach is also closely allied to the purposive theory of interpretation. This theory was applied by Kentridge AJ in *S v Zuma*,⁷⁸ and reinforced by Chaskalson in *Makwanyane*.⁷⁹ The constitutional court has already articulated three principles of purposive interpretation. It must recognise the unique qualities of the Constitution, within a South African context. The fact that attention must be paid to the history, tradition, culture and usage does not mean that the existing common law protection exhausts constitutional guarantees. Finally, purposive interpretation is conceptually different from a generous approach, and will not always result in the same conclusion.⁸⁰ In some instances a generous interpretation may overshoot the purposes of the right.

A value-based interpretation does not admit of universal guidelines or finally correct answers. Indeed, the constitutional court has experienced difficulty in this regard. Put differently, the court has failed to engage in substantive reasoning in its interpretation of the Constitution.⁸¹

⁷⁶*Op cit.*

⁷⁷Chaskalson P at 431 para C, he asserts that " the very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process".

⁷⁸1995 (2) SA 642 (CC) at para 15.

⁷⁹*Op cit* at para 39.

⁸⁰O'Regan J in *S v Makwanyane op cit* at 506 para B.

⁸¹Cockrell "Rainbow Jurisprudence" 1996 *SAJHR* 1 distinguishes between strict formalism - to which the courts previously (and in some instances still) adhered and in terms of which judges fail to go beyond the legal rule - and substantive reasons where judges are

A value-based interpretation is not only relevant to the determination of the ambit of the right, but also to the analysis of the impugned act under the limitation analysis.

I submit that a value-based approach underpinned by a commitment to communitarianism would best give expression to the underlying premises of the Constitution, as stated in its preamble. It would also mean that the court would have reached a different conclusion in *Du Plessis v De Klerk*,⁸² would have based its findings on a different premise in *Ferreira v Levin*⁸³ and that the finding of the majority in *S v Mhlungu*⁸⁴ is rationally defensible. In the latter case, Mohammed J emphatically states that the new Constitution represented "a ringing and decisive break with the past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action".⁸⁵

It still remains for such a theory, however, to counter the attack of an undisciplined judiciary so that, in the words of Kentridge AJ,⁸⁶ the Constitution is not anything we want it to be. I submit that the answer to this problem lay in the accountability of the judges for the decisions which they hand down. Froneman convincingly argues the point that the fear of an unbridled judiciary indulging in whimsical politics at the behest of the judge, is based on the supposition that under a system of parliamentary sovereignty, the law was a set of universally valid legal principles against which judges' decisions could be tested. It also assumes that under this system justice was dispensed

required to make hard choices between moral and political values.

⁸²*Op cit.*

⁸³*Op cit.*

⁸⁴1995 (3) SA 867, where the court interpreted section 241(8) of the interim Constitution, and concluded that it did not operate retrospectively - per Mohammed J

⁸⁵At 799. For strident criticism of this approach, see Fagan E "The Longest Erratum Note in History" (1996) 12 *SAJHR* 79. Also see Ziyad Motala "The Need for Disciplining Rules" (1998) 115 *SALJ* 141.

⁸⁶*S v Zuma op cit.*

in a neutral and value-free manner, which, in fact, was not the case. Consequently, according to him, not only is the premise faulty, but judges are, in fact, more accountable under a system of constitutional supremacy.⁸⁷ He distinguishes three categories of accountability, namely personal, formal and substantive:

- (i) Judges must take personal responsibility for their decisions and they must recognise the subjective nature of their views upon the decision. In this way they are forced to move beyond the formalism to which Cockrell refers, and accept that their decision may not be the only or indeed the correct one. They will take moral responsibility for their decisions and can no longer abdicate their function by justifying their decision as being one in which they did not have any choice. Put differently, there are no universal standards or rules to which they can refer and then mechanically apply the facts, on the previously often invoked positivist premise that judges apply and do not make the law.
- (ii) Formal accountability relates to the institutional controls placed on judges by the Constitution and other legislation. They are appointed on recommendations of the Judicial Service Commission,⁸⁸ and provision is made for their removal from office.⁸⁹ There are also procedures in the Constitution which provide for complaints about judges to the Judicial Services Commission.⁹⁰ In their totality, these provisions make them more accountable for their decisions, than was the case prior to the enactment of the interim Constitution.

⁸⁷Froneman "The Constitutional Invasion of the Common Law: Can the Judges Be Controlled?" in Carpenter (ed) *South Africa in Transition: focus on the Bill of Rights* 6 - 27 at 15.

⁸⁸Section 178(4).

⁸⁹Section 177.

⁹⁰Section 178(5) and 180(b).

- (iii) Finally, judges are accountable for the substance or merits of their decisions in terms of which these decisions should be subjected to vigorous public scrutiny and criticism. Informed public criticism and debate of judicial decisions would serve to underpin judicial accountability. This debate could be fostered via extensive media coverage and by making decisions more accessible and understandable to the people. The reason for this rational and critical inquiry into judicial decisions is two-fold. Firstly, the bill of rights guarantees freedom of expression which is integral to the democratic process, and secondly, it sets valid standards for criticism, which is based on the rejection of the notion of finally correct answers. However, for this rational and critical inquiry to have legitimacy it must animate the ideals of democracy, equality and fairness in its procedure. Froneman states that for these reasons "... there is no need to worry, because the judges can be controlled."⁹¹

It is true that our society does not have such a tradition, and that this will require of us to establish and maintain a culture of scrutinising judicial decisions in a rational manner, validly criticising the judiciary where this is justified and in so doing making it accountable for its decisions.

I submit, however, that this is a process foreign to our law and one on which we will have to embark if, as I suggested herein above, we follow the value-based approach of interpretation, since, in my view, it constitutes the most effective check on the abuse of power by the judiciary.

6 Conclusion

The failure of the value-based theory of interpretation to provide a universally reliable set of sign posts to guide judges in their decisions, and at the same time act as a restraint on the judiciary, coupled with the lack of universally valid and objective legal standards, has resulted

⁹¹*Op cit* 20.

in attempts to reinvigorate the discredited literalist approach to interpretation.⁹² It must be immediately apparent that such an approach is the very antithesis of the one advocated here, calling as it does for interpreting the ordinary meaning of the language within the four corners of the text.

The critique of this theory is best articulated by Prof. Davis⁹³ when he states that "... constitutional interpretation demands more than the exclusivity or luxury of a literalist enterprise. It challenges judges to think in ways beyond the ordinary meaning of words, and more fundamentally the certainty claimed for ordinary language removes constitutional rights from the political agenda for they become fixed and immutable. Constitutionalism is about contestation, ordinary language [is] about political closure".⁹⁴

I suggest that it is precisely because of this elasticity that the courts would be able to give meaningful expression to the socio-economic rights⁹⁵ entrenched in the Constitution, and in doing so, assist the achievement of a society based on human dignity and equality. This, in turn, would establish a society in which the full range of freedoms expressed in the bill of rights may be enjoyed.

The Indian experience has shown that this approach allows the court to bring genuine social justice to the majority of the people.⁹⁶

⁹²Fagan A "In defence of the obvious: ordinary meaning and the identification of Constitutional rules" (1995) *SAJHR* 545 - 570. See also Fagan E *op cit* and Motala *op cit*.

⁹³Davis D "The Twist of Language and the two Fagans: Please Sir May I Have Some More Literalism" (1996) *SAJHR* 504 at 507.

⁹⁴At 508.

⁹⁵Section 26 guarantees the right to housing. Section 27 deals with access to health care, section 28 provides for basic nutrition for children, section 29 guarantees the right to basic education.

⁹⁶Interestingly, the question may be asked whether the court, when it in fact gives effect to the will of the majority in this way, is acting as a countermajoritarian institution.

The basis underlying the value-based approach is summarised by Froneman.⁹⁷ "The real challenge to us is to accept that uncertainty about the future is, in reality, a basic precondition for a dynamic, progressive society. Unless it is confronted by constant changes and challenges a modern society will wither and die, or remain static and fail the aspirations of its people. And so too, the law."

A value-based approach to interpretation recognises that constitutional review is a countermajoritarian function aimed at securing the protection of fundamental rights and that this will sometimes require aggressive judicial intervention, whilst in other circumstances, the court will adopt a more differential attitude.

In response to the criticism that such a theory would result in the judicialisation of politics and the fear of an unchecked judiciary, I have attempted to show above that there are sufficient mechanisms to ensure a judge is in fact held to account for her decision.

⁹⁷*Op cit* at 24.

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LIST OF ABBREVIATIONS

Comparative and International Law Journal of Southern Africa	CILSA
Harvard Law Review	Harvard LR
Indiana Law Journal	Indiana LJ
Kentucky Law Journal	Kentucky LJ
Osgoode Hall Law Journal	Osgoode Hall LJ
Public Admin Law Review	Pub Admin LR
South African Journal on Human Rights	SAJHR
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